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IN THE

Supreme Court of the United States

October Term, 1968

No. 461

FRIEDA SUFFIN,

Petitioner

versus

THE PENNSYLVANIA RAILROAD COMPANY, PENNSYLVANIA COMPANY and NORFOLK AND WESTERN RAILWAY COMPANY,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS, THE PENNSYLVANIA RAILROAD COMPANY AND PENNSYLVANIA COMPANY, IN OPPOSITION

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OPINION BELOW

The opinion of the District Court for the District of Delaware is reported at 276 F. Supp. 549. The opinion of the Court of Appeals for the Third Circuit is not yet reported (Pet. App. 4a-7a).[1]

1. The reference "Pet. App." is to the appendix to the petition.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 8a-9a) was entered on June 6, 1968. The petition for a writ of certiorari was filed on August 30, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Does a one-judge district court have jurisdiction, in a stockholder's derivative suit seeking damages for a railroad company, to decide whether the consideration received by the carrier for the issuance of its securities was adequate, when the issuance of the securities has been approved by the Interstate Commerce Commission under Section 20a of the Interstate Commerce Act?

STATUTES INVOLVED

Relevant provisions of Section 5(2) and Section 20a of the Interstate Commerce Act, 49 U.S.C. 5(2) and 20a, as amended, are set forth at Pet. App. 1a-3a.

STATEMENT

The subject matter of this suit is an Exchange Agreement (the agreement) between Norfolk and Western Railway Company (N&W), on the one hand, and The Pennsylvania Railroad Company and its subsidiary, Pennsylvania Company (collectively, Pennsylvania) on the other. It provides that N&W will issue, in a series of transactions extending to 1974, a total of $104,000,000 principal amount of certain debentures in exchange for 800,000 shares of its common stock, a ratio equivalent to $130 of debentures for each such share. Pursuant to Section 20a of the Interstate Commerce Act (the Act), 49 U.S.C. 20a, the Interstate Commerce Commission (ICC or Commission) approved and authorized the issuance by N&W of its debentures to Pennsylvania in accordance with all the terms of the agreement. *Norfolk & Western R. Co. Securities,* 328 ICC 884 (1966) (hereinafter *N&W Securities*).

The suit is derivative in nature seeking on behalf of N&W money damages from Pennsylvania on the grounds that the agreement is unduly favorable to Pennsylvania and that negotiation of the agreement on the terms involved constituted a breach of fiduciary duty on the part of Pennsylvania as the allegedly controlling and dominating stockholder of N&W. Jurisdiction of the district court was invoked on the basis of diversity of citizenship of the parties and the amount in controversy.

The district court granted motions to dismiss the complaint for lack of jurisdiction on the ground that the issues could be reviewed only by a three-judge district court pursuant to provisions of the Judicial Code, 28 U.S.C. 2321-2325. *Suffin v. Pennsylvania Railroad Company,* 276 F. Supp. 549 (D. Del. 1967). The court of appeals affirmed, Pet. App. 4a-9a.

In *Norfolk & Western R. Co. and New York, Chicago & S. L. R. Co.—Merger, etc.*, 324 ICC 1 (1964) (hereinafter *N&W Merger*), the Commission approved certain merger and other unification transactions proposed by N&W, on condition that Pennsylvania agree to divest itself over a 10-year period of its ownership of N&W stock. More than one-third of the ICC Report (324 ICC 32-49) is devoted exclusively to the existing and future relationships between N&W and Pennsylvania, and the conditions for the divestiture were precisely stated (pp. 48-49). Included in the Report is a suggestion that N&W might agree to "annual sales to (it) of shares of its stock over a period of years" (324 ICC 41). The ICC expressly retained continuing jurisdiction over the divestiture for the purpose "among others" of insuring that it proceed in an orderly manner (324 ICC 48).

The complaint alleged, and the petition here repeats, that the agreement involved was made on September 22, 1964 at a time when Pennsylvania owned one-third of N&W's voting stock and had interlocking directors on its Board. The ICC report in *N&W Securities* reveals to the contrary (1) that N&W's Board of Directors had authorized the transaction more than a year after the resignation of interlocking directors, on September 28, 1965 and (2) that the agreement was actually dated as of December 31, 1965, considerably after Pennsylvania had been completely divested of control by its compliance with a Commission requirement that all voting rights in N&W stock owned by Pennsylvania be transferred to "three independent voting trustees" (328 ICC 885).

In reviewing the N&W application for authority to issue its debentures to Pennsylvania in *N&W Securities*, the Commission noted that the transaction was "part of a program of divestiture to comply with these (merger) condi-

tions'' (328 ICC 885), and reviewed in detail the principal provisions of the agreement and particularly all of the terms of the proposed debentures (328 ICC 885-888). It concluded that the debenture-stock exchange ''should minimize the impact of Pennsylvania's divestiture program on the market price of (N&W's) common stock'' and would thus be ''in the best interest of (N&W) and its security holders'' (328 ICC 891).

That the present suit does not seek to present any new facts, and does not allege that any relevant facts were withheld from the ICC, appears clearly from the thorough consideration to all these matters which the Commission gave in its reports both in *N&W Merger* and *N&W Securities*. It was on this, among other grounds, that both the district court and the court of appeals recognized the suit as an attempt to collaterally attack a decision of the ICC. Both courts concluded that a decision of the Commission can be reviewed only by a three-judge district court pursuant to 28 U.S.C. 2321-25.

ARGUMENT

The decision below is not in any way inconsistent with recent rulings in other federal cases and is, in fact, sustained by clear rulings of this Court.

Where the successful outcome of a collateral suit would, as here, have the practical effect of preventing either one or all of the parties to a transaction—approved by the ICC under Section 5, 20a or both—from implementing that transaction, the courts have without exception applied the clear jurisdictional requirement of the Judicial Code. Specific examples of this are *Venner v. Mich. Cent. R.R. Co.*, 271 U.S. 127, *United States v. Railway Exp. Agency*, 101 F. Supp. 1008 (D. Del. 1951), and *Abramson v. Western Maryland Railway Company*, 142 F. Supp. 694 (E.D. Pa. 1956).

Petitioner contends that this established rule does not apply here because the Commission in approving the issuance of securities under Section 20a of the Act does not, and cannot, determine the adequacy of the consideration the carrier receives for the securities. This contention is contrary to rulings by this Court that the Commission must resolve all issues arising in a Section 20a transaction, whether private or public. In the leading case of *Schwabacher v. United States*, 334 U.S. 182, the opinion observed (334 U.S. at 197):

> "The jurisdiction of the Commission under both § 5 and § 20a is made plenary and exclusive and independent of all other state or federal authority."

This Court went on to emphasize the sweeping character of the ICC function under both sections by saying that: "In matters within its scope it is the supreme law of the land," and that rights of parties to a transaction before the Commission "must be founded on federal, not on state, law." (334 U.S. at 198)

Contrary to petitioner's argument, this Court in a recent opinion emphasizes that there is no distinction between the scope of Commission responsibility under Section 5 and that under Section 20a. In *Denver and Rio Grande Western R. Co. v. United States,* 387 U.S. 485 at page 493 this Court said:

> "But the foundations of the ICC's obligation under § 5 are largely applicable to § 20a as well. Section 20a, like § 5, must after all be read in the context of overall ICC responsibilities. . . . The responsibility to advance the National Transportation Policy, read into the 'public interest' standard of § 5, is another persistent and overriding duty, equally applicable to § 20a."

With regard to petitioner's contention that the ICC under Section 20a may not determine whether the issuance of securities by a carrier is on fair or adequate terms, this Court has had before it a case in which the Commission's determination on that precise point was challenged. *Breswick & Co. v. United States,* 156 F. Supp. 227 (S.D. N.Y. 1957) was one of a series of related cases in which minority stockholders of Alleghany Corporation sought review of an ICC order under Section 20a authorizing their company to issue preferred stock. That stock, as are the N&W debentures here, was to be issued in exchange for other securities of the carrier at a fixed ratio. One ground of the attack on the ICC order was the contention "that the Commission's findings as to the fairness of the issue are inadequate and are in conflict with undisputed facts" (156 F. Supp. at 229). On this point the three-judge district court held "that the questions so raised were within the range of expert judgment referred to the Commission" (156 F. Supp. at 230). The court nevertheless set aside the ICC order on another ground.

This Court reversed in a *per curiam* order in *Alleghany Corp. v. Breswick & Co.*, 355 U.S. 415. The case was remanded to the three-judge district court for final determination of the sole question whether the ICC's approval of the issuance of preferred stock was in accordance with the Act. On remand the decision of the ICC was upheld. *Breswick & Co. v. United States,* 160 F. Supp. 754 (S.D.N.Y. 1958).

Petitioner here is contending that a federal district court exercising diversity jurisdiction (or a state court, for that matter) may try *de novo* under state law principles a challenge to the basic terms of a security transaction between two railroads, involving over $100,000,000, which has received the express authorization and approval of the ICC under Section 20a. This would be wholly inconsistent with the regulatory scheme established many years ago by Congress. The issue presented is clearly one for the ICC in the first instance, subject only to the regular procedure for the review of Commission orders by a three-judge district court under the Judicial Code, 28 U.S. §§ 2321-25.

Petitioner's argument under the Fifth Amendment to the Constitution approaches frivolity. She contends that the stockholders of N&W should have been given notice of the ICC proceeding under Section 20a. This ignores the fact that stockholders as such are not essential parties to the ICC proceeding. In fact, they are not in any way the real party in interest to this suit. The action is derivative in nature and is brought in the right of N&W itself and not by or for its stockholders themselves. Of course, the N&W had full notice of the ICC proceeding under Section 20a because it initiated that proceeding by filing an application. What petitioner seems to argue is that the due process clause of the Fifth Amendment requires individual notice to the stockholders of a carrier whenever their company files an application with the ICC—apparently on the ground

that one or more of them might oppose the action by their company. There is, of course, no statutory or decisional basis for any such procedure. More significantly, the rights of railroad shareholders are fully preserved by their established right to intervene in ICC proceedings and to seek three-judge court review of ICC orders.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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October, 1968